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Bill 20-48, The Civil Asset Forfeiture Amendment Act of 2013

Council of the District of Columbia
Committee on the Judiciary and Public Safety
Chairman Tommy Wells

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Thank you for the opportunity to submit a written statement supplementing my July 11, 2013 testimony in favor of Bill 20-48, the Civil Asset Forfeiture Amendment Act of 2013. The Committee is to be commended for responding to the growing problem of forfeiture abuse and considering this modest but much-needed reform measure. This statement is also submitted in opposition to the Executive's recently introduced measure, Bill 20-419, the Civil Forfeiture Procedures Amendment Act of 2013. The Executive's proposal is a stopgap measure that narrowly addresses the constitutional infirmities identified by federal litigation[1] and falls short of correcting the most significant problems of civil forfeiture in the District.

My name is Darpana Sheth and I am an attorney at the Institute for Justice, a nonprofit, public-interest law firm dedicated to protecting individuals from, among other things, forfeiture abuse. IJ has produced original research documenting the problem of civil forfeiture—most notably a comprehensive nationwide study, titled *Policing for Profit*, which evaluates each state's forfeiture laws.[2] As an attorney at IJ, I have represented property owners defending against civil-forfeiture actions as well as challenged the constitutionality of civil-forfeiture procedures.

Civil forfeiture is the power of law enforcement to seize and keep property suspected of being involved in criminal activity. With civil forfeiture—unlike criminal forfeiture—law enforcement can take cash, cars, homes, or other property without so much as charging the owner with a crime, let alone convicting him of one.

After discussing the ways in which today's civil-forfeiture laws, like those in the District, have departed dramatically from early forfeiture laws, this statement explains how D.C.'s current forfeiture law incentivizes seizing forfeitable property without providing adequate procedural safeguards to protect innocent property owners. Finally, this statement addresses the need for reform to protect all kinds of property, not merely vehicles.

I. Like Its Federal and State Counterparts, the District's Civil-Forfeiture Laws Have Become Unmoored from the Original Justification Envisioned by the Founding Generation.

In stark contrast to today's civil-forfeiture laws, such as those in the District, forfeiture laws at the time of our nation's founding were limited in scope and justification. For example, early laws authorizing forfeiture were based on the unquestioned ability of the government to seize contraband, in which no property rights existed. Contraband included not only *per se* illegal goods and stolen goods, but also goods that were concealed to avoid paying required customs duties, which at the time provided 80 to 90 percent of the finances for the federal

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[1] *Simms v. District of Columbia*, 872 F. Supp. 2d 90 (D.D.C. 2012) (enjoining District's retention of vehicles seized for forfeiture without prompt hearing as violation of due process). *See also Hardy v. District of Columbia*, 283 F.R.D. 20 (D.D.C. 2012) (certifying class action challenging constitutional adequacy of notice procedures under D.C. forfeiture statute).

[2] Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D., & Scott G. Bullock, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (Institute for Justice, 2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

government.[3] *See* Act of July 31, 1789, 1 Stat. 29, 43 (providing that all "goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited"). Additionally, forfeiture of non-contraband items was justified only by the practical necessities of enforcing admiralty or piracy laws. As an *in rem* proceeding—an action against the property itself—civil forfeiture allowed courts to obtain jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of admiralty or piracy violations because they were overseas or otherwise outside the court's jurisdiction.[4] It was this necessity to obtain jurisdiction over the property that gave rise to the legal fiction, on which civil forfeiture is based, that property can itself be "guilty" of wrongdoing, regardless of whether the property's owner is blameworthy in any way.

Although civil-forfeiture laws have been on the books since our nation's founding, civil forfeiture remained a relative backwater in American law throughout most of the 20th century. During the Prohibition Era, the federal government expanded the scope of its forfeiture authority beyond *per se* contraband to cover automobiles or other vehicles transporting illegal liquor. However, the forfeiture provision of the National Prohibition Act was considered "incidental" to the primary purpose of "destroy[ing] the forbidden liquor in transportation."[5]

Today's civil-forfeiture laws trace their origins to the War on Drugs. Consequently, today's laws differ from their predecessors in three key respects. First, as exemplified by D.C.'s current forfeiture statute, civil-forfeiture laws today are broader in scope, covering not only illegal drugs, contraband, and any conveyance used to transport them, but all manner of real and personal property involved in the alleged criminal activity. Like its federal counterpart, D.C. subjects to forfeiture all real and personal property "used, or intended to be used, in any manner or part, to commit, or facilitate the commission of" a drug crime.[6] At the federal level, Congress has expanded forfeiture beyond alleged instances of drug violations to include myriad crimes. Today there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.[7]

Second, in contrast to most of American history, during which the proceeds from civil forfeitures went to a general fund to benefit the public at large, federal forfeiture laws and those of the District allow law-enforcement agencies responsible for seizing the property to keep proceeds from forfeiture. In 1984, Congress amended parts of the Comprehensive Drug Abuse and Prevention Act of 1970 to allow federal law-enforcement agencies to keep a portion of the

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[3] James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last?* 62 CORNELL L. REV. 768, 782 n.86 (1977).

[4] *See, e.g.*, *The Brig Malek Adhel*, 43 U.S. 210, 233 (1844) (justifying forfeiture of innocent owner's vessel under piracy and admiralty laws because of "the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong") (emphasis added); *The Palmyra*, 25 U.S. 1, 14 (1827) (revenue laws); *United States v. The Schooner Little Charles*, 1 Brock. 347, 354 (C.C.D.Va. 1819) (Marshall, C.J.) (embargo laws).

[5] *Carroll v. United States*, 267 U.S. 132, 155 (1925).

[6] *See, e.g.*, D.C. Stat. § 48-905.02 (a) (5)-(7), (8).

[7] *See* Asset Forfeiture and Money Laundering Section, U.S. Dep't of Justice Criminal Div., SELECTED FEDERAL ASSET FORFEITURE STATUTES (2006), *available at* http://www.justice.gov/criminal/foia/docs/afstats06.pdf.

forfeiture proceeds in a newly created Assets Forfeiture Fund.[8] Initially, any forfeiture proceeds exceeding $5 million that remained in the Assets Forfeiture Fund at the end of the fiscal year were to be deposited in the Treasury's general fund.[9] Additionally, the government's use of proceeds in the Assets Forfeiture Fund was restricted to a relatively limited number of purposes, such as paying for forfeiture expenses like storing the property or giving awards for information that led to forfeitures.[10] However, subsequent amendments eliminated both the $5-million cap and dramatically broadened the scope of expenses the government could pay for with the Assets Forfeiture Fund, including purchasing vehicles and paying overtime salaries.[11] In short, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds—subject only to very loose restrictions—giving them a direct financial stake in generating revenue from forfeiture.[12] Similarly, the District gives law-enforcement agencies 100 percent of forfeiture proceeds.[13]

Third, by allowing law-enforcement officials to retain forfeiture proceeds, federal and state forfeiture laws create a perverse financial incentive to maximize the seizure of forfeitable property. Consequently, unlike its early relatives, with today's forfeiture laws, forfeiture of property is often the primary purpose of the seizure. As the former chief of the federal government's Asset Forfeiture and Money Laundering Offices observed, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."[14] Indeed, according to a July 2012 report by the United States Government Accountability Office, one of the three primary goals of the Assets Forfeiture Fund is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."[15] The same holds true for the District. At the July 11, 2013 hearing, government witnesses confirmed the District's interest in revenue. According to Renatta Cooper, a representative from the U.S. Attorney's Office for the District of Columbia, directing forfeiture proceeds to a general fund would have a "significant negative financial impact on the Metropolitan Police Department."[16]

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[8] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[9] *Id*. § 310, 98 Stat. at 2053 (previously codified at 28 U.S.C. § 524(c)(7)).

[10] *Id*. § 310, 98 Stat. at 2052 (previously codified at 28 U.S.C. § 524(c)(1)).

[11] 28 U.S.C. § 524(c)(1)(F)(i), (c)(1)(I).

[12] Although Congress enacted the Civil Asset Forfeiture Reform Act in 2000, none of those reforms changed how forfeiture proceeds are distributed or otherwise mitigated the direct pecuniary interest law-enforcement agencies have in civil forfeitures. *See* Pub. L. No. 106-185, 114 Stat. 202 (2000).

[13] D.C. Stat. § 48-905.02(d)(4).

[14] Richard Miniter, *Ill-Gotten Gains*, REASON, Aug. 1993, at 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), *available at* http://reason.com/archives/1993/08/01/ill-gotten-gains.

[15] U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 6 (2012), *available at* http://www.gao.gov/assets/600/592349.pdf.

[16] *Civil Asset Forfeiture Amendment Act: Hearing on Bill 20-48 Before the Committee on the Judiciary and Public Safety*, 20th Sess. (D.C. Council, July 11, 2013) (statement of Renatta Cooper, U.S. Attorney's Office for the District of Columbia).

In sum, no longer is civil forfeiture tied to seizing contraband or the practical difficulties of obtaining personal jurisdiction over an individual. Unmoored from its historical limitation as a necessary means of enforcing admiralty and piracy laws, civil forfeiture has morphed into a revenue-generating enterprise for law enforcement.

II. The District Earns Failing Grades for Its Forfeiture Laws and Equitable-Sharing Practices.

Under the metrics used by IJ's Policing for Profit study, the District of Columbia earns failing grades both for its forfeiture laws and the extent to which it profits by referring forfeitures to the federal government under the equitable-sharing program. Like the worst states in IJ's study, the District incentivizes forfeiture by returning 100 percent of the proceeds to law enforcement while also failing to provide adequate procedural safeguards to protect innocent property owners.

A. D.C.'s Forfeiture Law Perversely Incentivizes Seizing Forfeitable Property.

Perhaps the most troubling aspect of D.C.'s forfeiture law is that all proceeds from forfeited property go directly back to law-enforcement agencies that seized the property, giving police and prosecutors a substantial budgetary stake in forfeiture and short-circuiting legislative oversight. Last year, D.C. law enforcement collected over $1.6 million in forfeiture proceeds, bringing its total for the last three years to over $4.8 million. D.C. law enforcement has also profited greatly from the federal equitable-sharing program. Under this program, state and local law enforcement receive up to 80 percent of proceeds for referring forfeiture cases to federal authorities. From 2000 to 2012, D.C. law enforcement collected over $8.2 million in equitable-sharing payments from the federal government.

While all of this money may sound like a great thing, law enforcement's retention of forfeiture proceeds violates two key constitutional principles: separation of powers and the impartiality requirement of due process. First, funding agencies outside the legislative process violates the separation of powers. With forfeiture funds, police departments and prosecutors' offices—members of the executive branch—become self-financing agencies, unaccountable to members of this Council or the public at large.

Second, giving law enforcement a direct financial stake in the seizures violates the basic due-process requirement of impartiality. Impartiality in the administration of justice is a bedrock principle of the American legal system, enshrined in the Due Process Clause of the Constitution. By allowing law enforcement to retain forfeiture proceeds, the District's civil-forfeiture law dangerously shifts law-enforcement priorities from fairly and impartially administering justice to generating revenue. In defending the government's financial interest in civil forfeiture, the Attorney General incorrectly asserted that no court has criticized this practice.[17] To the contrary, the judiciary has sounded the alarm about the government's aggressive use of forfeiture

[17] *Civil Asset Forfeiture Amendment Act: Hearing on Bill 20-48 Before the Committee on the Judiciary and Public Safety*, 20th Sess. (D.C. Council, July 11, 2013) (statement of Irvin B. Nathan, District of Columbia Attorney General).

particularly in light of its "direct pecuniary interest in the outcome of the proceeding."[18] Courts "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."[19]

More broadly, the Supreme Court has closely scrutinized the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings and has repeatedly struck down regulatory schemes that create an impermissible conflict of interest. For example, in *Tumey v. Ohio*, the Supreme Court overturned a fine where the mayor also sat as a judge and personally received a share of the fines.[20] However, it is not just the prospect of personal gain that merits vigilance; institutional gain also runs afoul of due process. In *Ward v. Village of Monroeville*, the Supreme Court found a due process violation where a substantial portion of the town's revenues came from fines imposed by the mayor sitting as a judge.[21]

Direct and substantial financial incentives for police and prosecutors are also impermissible under the Due Process Clause. For instance, in *Young v. United States ex rel. Vuitton*, a judge appointed the lawyers for the Vuitton Company as special prosecutors in a contempt action against other companies for violating a court order against trademark infringement.[22] If the companies were found guilty of contempt, the Vuitton Company stood to recover liquidated damages in the underlying action. The Court held that, despite judicial supervision of the prosecution, the financial incentives for prosecution were too direct and created an improper conflict of interest.[23] And in *Marshall v. Jerrico, Inc.*, the Supreme Court cautioned about the "possibility that [the official's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."[24] In discussing due process constraints on prosecutors, the Court noted:

> Prosecutors are also public officials; they too must serve the public interest. . . . Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.[25]

Direct profit incentives for officials charged with enforcing the law can lead to improper conflicts of interest or the appearance of improper conflicts, and are therefore, unconstitutional.

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[18] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993).

[19] *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

[20] 273 U.S. 510 (1927).

[21] 409 U.S. 57 (1972).

[22] 481 U.S. 787 (1987).

[23] *Id.* at 805-07;

[24] 446 U.S. 238, 250 (1980).

[25] *Id*. at 249-50.

Both D.C.'s current forfeiture scheme and the Executive's alternative proposal (Bill 20-419) suffer from this constitutional defect.

In contrast, Bill 20-48 requires all forfeiture proceeds to be deposited to a general fund where elected officials decide—as the legislative branch is charged with doing—how the money is spent. This eliminates the profit incentive under D.C.'s forfeiture law. The Attorney General makes much out of a purported conflict with federal law. Although the U.S. Justice Department has implemented a policy requiring equitable-sharing payments to go to law-enforcement purposes, nothing in federal law requires forfeiture proceeds from D.C.'s own forfeiture law to go to law enforcement. Moreover, nothing in federal law dictates that local law-enforcement agencies decide how equitable-sharing proceeds are spent. In light of Justice Department's broad definition of law-enforcement purposes, the D.C. Council can direct equitable-sharing proceeds to purposes such as conducting drug or gang education and awareness programs like DARE, language assistance services for law-enforcement personnel and 911 operators, and training programs for law enforcement on the Fourth Amendment, due process, and protecting the rights of innocent third parties.[26]

In sum, incentivizing forfeiture by creating a direct financial incentive is not only unconstitutional but bad public policy. Unlike the Executive's proposal, Bill 20-48 remedies this problem.

B. The District's Civil-Forfeiture Laws Provide Inadequate Procedural Safeguards to Protect Innocent Property Owners.

In addition to incentivizing forfeiture, the District makes forfeiture all too easy for law enforcement by providing few procedural safeguards. Because it is a civil proceeding, civil forfeiture does not provide all the legal rights guaranteed to individuals charged with crime who face criminal proceedings, such as the right to counsel. This difference can best be seen in the different burdens of proof. The individual charged with a crime enjoys the presumption of innocence and the government must prove the crime beyond a reasonable doubt. Property owners enjoy no such procedural protections in civil-forfeiture proceedings. In fact, D.C. is in the minority of jurisdictions that allow forfeiture based on a bare-bones showing of probable cause to believe that the property is the proceeds of a crime or was used to commit a crime. Once the government meets this low hurdle, the burden shifts to the property owner to either rebut the probable-cause showing or prove that the owner did not know of the illegal conduct. In this upside-down world of forfeiture, property is presumed "guilty" and owners must prove a negative—the absence of knowledge—to recover what is rightfully theirs. This turns the presumption of innocence—a hallmark of the American justice system—on its head.

If that weren't enough, property owners do not have a right to a speedy trial. Under the District's current statute, property owners have no opportunity to object to the seizure until the forfeiture trial itself, which can be months or even years away.

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[26] U.S. Department of Justice, *Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies* (April 2009), *available at* http://www.justice.gov/usao/ri/projects/esguidelines.pdf.

III. Any Reform Measure Must Also Protect Other Property, in Addition to Vehicles.

Meaningful reform of civil forfeiture must encompass all property, not merely vehicles as in the Executive's proposal. Even temporary or partial deprivations of property rights are protected by the constitutional guarantees of due process.[27] Depriving people of property not proven to be subject to forfeiture can work a great hardship. By depriving individuals of their vehicles and other property without adequate notice or preliminary hearing, D.C.'s current forfeiture scheme violates constitutionally protected rights to private property.

As is apparent from Committee Chair Wells's statements during the hearing and the Office of the Attorney's General's alternative reform proposal, individuals have a strong interest in retaining possession of their vehicles during the pendency of civil-forfeiture proceedings. "Automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life."[28] Indeed, Latisha Rees testified that as a result of the District's forfeiture procedures, she was forced to drop out of nursing school because she was left without a means to travel to her classes.[29]

However, individuals also have a strong interest in retaining possession of other kinds of property.[30] Failing to provide a prompt hearing at which property owners can contest the validity of the seizure can prevent innocent individuals from securing counsel for the forfeiture trial. It can also deprive an individual "of the very means by which to live while he waits" for the forfeiture trial.[31] Holding onto seized property until final adjudication without a preliminary hearing can harm the ability of those of more modest means "to obtain essential food, clothing, housing, and medical care";[32] to make mortgage[33] or car payments; or pay utility[34] and other bills. Moreover, the restraint can damage a person's credit rating, reducing the ability to obtain a loan to pay for these necessities.[35] The Supreme Court has repeatedly recognized that the Due

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[27] *See Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.").

[28] *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994); *see also Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.).

[29] *Civil Asset Forfeiture Amendment Act: Hearing on Bill 20-48 Before the Committee on the Judiciary and Public Safety*, 20th Sess. (D.C. Council, July 11, 2013) (statement of Latisha Reese).

[30] *See, e.g.*, *Mitchell v. W.T. Gant Co*., 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

[31] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *id.* at 264 ("[The] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . . .").

[32] *Id.*

[33] *Doehr*, 501 U.S. at 11 ("[A]ttachments, liens, and similar encumbrances" can "place an existing mortgage in technical default where there is an insecurity clause.")

[34] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of times may threaten health and safety.").

[35] *Doehr*, 501 U.S. at 11.

Process Clause requires a hearing before the government can deprive individuals of property needed to pay for living expenses.[36]

Even if the property owner ultimately prevails at the civil-forfeiture trial and the property is returned, the interim deprivation works an irreparable injury. The Supreme Court has repeatedly cautioned that a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented."[37] The availability of an eventual trial "is no recompense for losses caused by erroneous seizure." *Id*.

> This Court has . . . repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.[38]

Just as in these cases, retaining property without affording the owner an opportunity to be heard inflicts an irreparable injury.

In sum, both the individual's right to property and the irreparable injury caused by the length of the deprivation before trial necessitates a prompt preliminary hearing not only for vehicles but for all property.

CONCLUSION

It is beyond dispute that D.C.'s civil-forfeiture laws require reform. Bill 20-48 is a much-needed but modest reform measure that preserves civil forfeiture while correcting its major constitutional deficiencies. By preserving civil forfeiture and leaving criminal forfeiture untouched, Bill 20-48 also fulfills the government's interest in deterrence of crime and disgorgement of ill-gotten gains. In contrast, the Executive's proposal is a stopgap measure that addresses only the *Simms* ruling, but leaves other constitutional and policy infirmities intact.

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[36] *See, e.g.*, *Craft*, 436 U.S. at 22 (holding that due process requires notice of availability of procedures for disputing utility bill and administrative procedure for customer complaints prior to termination of services); *Goldberg*, 397 U.S. at 266 (holding that New York's termination of welfare benefits without prior evidentiary hearing denied due process).

[37] *James Daniel Good*, 510 U.S. at 56; *see also Doehr*, 501 U.S. at 15 ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Craft*, 436 U.S. at 20 ("Although utility services may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

[38] *Comm'r of I.R.S. v. Shapiro*, 424 U.S. 614, 629 (1976).